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C O N F I D E N T I A L SECTION 01 OF 02 ABUJA 002105

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SUBJECT: CORRECTED COPY: PRESIDENTIAL TRIBUNAL: PARTIAL  
VICTORY AND POETIC JUSTICE FOR BUHARI

REF: ABUJA 1939 AND PREVIOUS

Classified By: Charge d'Affaires Thomas P. Furey. Reasons 1.5 (B & D).

CORRECTED COPY: REFTEL ADDED

11. (C) SUMMARY: The longest case in Nigerian legal history closed with a three to one split decision on the 2003 Presidential elections. While the court declined to throw out the results nation-wide, elements of the decision were as good as the Buhari legal team expected. The dissenting justice said that the entire election should be overturned because of severe deficiencies in the electoral process. While the judgement is not yet published, the two sides will have 24 days to file appeals to the Supreme Court, which could decide the outcome by June 2005. END SUMMARY.

#### THE COURTROOM

12. (U) The longest case in Nigerian legal history closed its first phase December 20 with a three to one split decision on the Presidential election case brought by ANPP candidate Muhammadu Buhari against President Obasanjo, Vice President Atiku Abubakar, and the Independent National Election Commission (INEC). A five-block area around the Federal Appeals Court was closed off by 600 policemen and security was tight in the area. About 1,000 onlookers gathered at the cordon to wait for the Tribunal's decision. Inside the courtroom, about 200 people squeezed into a space designed for 100 to await the decision scheduled for 9 AM. Efforts to control access to the court were hampered by the number of high level personages hoping to look on, including ANPP Chairman Don Etiebet, his challenger and former Minister of the Federal Capital Territory Jeremiah Useni, Former PDP Speaker of the House Ghali Na'abba and Buhari.

13. (C) As the appointed hour passed, nervous court personnel appeared from time to time to assess the crowd and the attorneys for both the Petitioner (Buhari) and the Respondents (INEC and Obasanjo) periodically left the courtroom to consult. One court staffer told Poloff that the four-member judicial panel was not ready to deliver its judgement because of the dissenting judge. According to the staffer, the other three judges were trying to convince the lone dissenter, Justice Sylvester Nsofor (the second ranking member of the panel), to either agree or to refrain from reading the dissent in the courtroom. "A lot of table-pounding is going on," the staffer said.

14. (C) When the judges entered the courtroom, Nsofor appeared angry and sat silently shuffling papers while the majority opinion was read. Justice Francis Tabai, who read the majority decision, appeared nervous and, with shaking hands, had difficulty reading from the decision.

#### THE DECISION

15. (C) Tabai stated that the decision of the court, driven by the court's "fear of crisis," was to dismiss the reliefs asked for by the petitioner except in limited areas, providing only a partial victory for Buhari. Providing a bit of poetic justice, he said that the election in Ogun state (Obasanjo's home state) was overturned in its entirety and stated that "other Local Government Areas, wards and polling stations" were also overturned, but did not offer a list of the affected areas. He went on to criticize INEC for its failures and said that the Nigerian Police Force had acted in a "biased manner" in the conduct of elections. Tabai also criticized the National Assembly for the "faulty" Electoral Act of 2002. All four justices agreed that the burden of proof in an election tribunal should be on the petitioner where elections took place but results were disputed, but that the burden of proof should be on the respondent where the question was whether elections took place at all.

16. (C) Presiding Justice Umaru Abdullahi affirmed his agreement with the majority decision, but added his own emphasis to the sections of the decision read by Tabai. After agreeing with the decision to overturn Ogun State and other elections, Abdullahi emphasized that the returns announced by INEC were "unimaginable" and that INEC had proven itself "partisan and refused to provide results of the election as required by law." Without the official documents

from INEC, Abdullahi continued, it was impossible to prove that "elections had taken place." He also commented that the respondents had made no effort to prove that elections had taken place in the "14 states plagued by violence and questionable activities" by government officials.

17. (C) Given his chance to speak, Nsofor criticized the elections and his colleagues on the bench, citing several "grave errors in law" committed by the other judges. He dissected the majority opinion, itemizing the areas where the majority had erred. According to Nsofor, the first error was in the pleadings. He said that in Nigerian jurisprudence, any fact plead by the petitioner that was not disputed by the respondent should be accepted as stipulated. In fact, he said, the other three justices did the opposite. His second complaint was that INEC's refusal to respond was material and that the petitioner could not be expected to present proof of his claims if "no official record of the election exists." He continued that in any area where the security agencies had been shown to interfere in a biased fashion, that an "open election" could not be deemed to have taken place. Before he wrapped up his dissent, Abdullahi told him that his time was up and tried to adjourn the court. Nsofor responded, "I will finish my presentation regardless."

#### THE REACTION

18. (C) Buhari and several other politicians were not happy. One of them commented to poloff, "God help my country." Even so, Mike Ahamba, Buhari's lead attorney was satisfied. He told the press outside the courtroom that the court had confirmed the basic complaints of his case: INEC and the security agencies had been partisan and irregularities were widespread. Ahamba was also pleased that the court had given him the grounds for appeal and, by the dissent, had laid out the strategy he should use for the next round. "If INEC would not produce the results, how could the elections stand?" he asked rhetorically.

19. (C) While the national media coverage claimed that the election petition had been "thrown out" by the court, it is hard to imagine the President being pleased with the judgement. While the decision left him in place, the embarrassment of cancelling the elections in his home state and the criticism of INEC and the police do not help his self-assumed image.

#### THE FUTURE

10. (C) The majority decision was not ready for publication at the time of the hearing although the dissenting view was completed. Each side has 24 days from the time the written decision is made available to file an appeal to the Supreme Court. It is almost certain that Ahamba will appeal the decision by mid-January, basing his appeal on the partisan nature of INEC and the errors in law cited in the dissenting opinion. While Obasanjo retains his seat, it is possible that an appeal will be filed on his behalf simply to overturn the embarrassment of his home state's deficiencies. In either case, the clock will begin ticking again and the Supreme Court could finally dispose of this issue before June, 2005.

FUREY